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Maria Chin bt Abdullah v Suruhanjaya Pilihan Raya

B HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA25–178–10 OF 2016
AZIZUL AZMI ADNAN JC
24 NOVEMBER 2016

C *Civil Procedure — Judicial review — Application for leave — Respondent published notice relating to constituencies for election without details regarding land mass — Applicant contended notice deficient — Whether application frivolous — Whether there was arguable case — Rules of Court 2012 O 53 r 3*

D The Election Commission ('the respondent') had published a notice entitled 'Notice of proposed recommendations for the Federal and State Constituencies in the States of Malaya as reviewed by the Election Commission in 2016' ('the notice') on 15 September 2016. However, the notice did not provide details regarding the land mass of a proposed constituency. The applicant submitted E that the notice was deficient as a consequence of this omission because it deprived the applicant of the opportunity to make competent and effective objections to the proposed recommendations by the respondent. Consequently, the applicant filed the present action for leave of court to make an application for judicial review pursuant to O 53 r 3 of the Rules of Court F 2012 and applied for certiorari to quash the notice and mandamus to compel the respondent to provide the land mass particulars to the applicant. The issues for consideration were whether the application was frivolous and whether there was an arguable case.

G **Held,** dismissing the application with no order to costs:

(1) The application was not frivolous, taking into account the fact that the matter for which review was sought affects the fundamental expression of a constitutionally-guaranteed right that is the hallmark of a free H democratic society, namely the right to vote. The applicant was also a registered voter in the relevant state and federal constituencies and hence would appear to have sufficient locus standi to make the application (see para 13).

(2) The basis of the applicant's putative challenge lay wholly and entirely on I the fact that the respondent had not included the details of the land mass of the proposed constituencies in the notice. The Court of Appeal in the case of *Pengerusi Suruhanjaya Pilihanraya Malaysia (Election Commission of Malaysia) v See Chee How & Anor* [2016] 3 MLJ 365 had fully taken into account the issue of land mass and had made a specific finding that

such information was not necessary. The said information did not change the rationale for that decision nor its applicability to the facts of the instant case. Having reviewed the judgment of the Court of Appeal in its entirety and in the light of the basis upon which the applicant sought to challenge the notice, the applicant did not have an arguable case for the court to allow the case to be heard in a substantive hearing (see paras 16–17 & 20–21).

[Bahasa Malaysia summary

Suruhanjaya Pilihanraya ('responden') telah menerbitkan notis bertajuk 'Notice of proposed recommendations for the Federal and State Constituencies in the States of Malaya as reviewed by the Election Commission in 2016' ('notis tersebut') pada 15 September 2016. Walau bagaimanapun, notis tersebut tidak memperuntukkan butir-butir berkenaan dataran terhadap kawasan pilihanraya yang dicadangkan. Pemohon berhujah bahawa notis adalah tidak memadai akibat daripada ketinggalan ini kerana ia menafikan pemohon terhadap peluang untuk membuat bantahan kompeten dan efektif kepada cadangan yang diusulkan oleh responden. Akibatnya, pemohon memfailkan tindakan ini bagi kebenaran mahkamah untuk membuat permohonan bagi semakan kehakiman berikutan A 53 k 3 Kaedah-Kaedah Mahkamah 2012 dan memohon untuk certiorari untuk membatalkan notis dan mandamus untuk memaksa responden memberikan butiran dataran kepada pemohon. Isu-isu untuk pertimbangan adalah sama ada permohonan adalah remeh dan sama ada terdapat kes yang boleh dihujahkan.

Diputuskan, menolak permohonan tanpa perintah kepada kos:

(1) Permohonan bukan remeh, mengambil kira fakta bahawa perkara yang mana semakan dipohon menjejaskan penyataan asas hak perlembagaan terjamin yang mana adalah jaminan masyarakat demokratik bebas, iaitu hak untuk mengundi. Pemohon juga adalah pengundi yang berdaftar di kawasan pilihanraya Negeri dan Persekutuan yang relevan dan maka dianggap mempunyai locus standi yang mencukupi untuk membuat permohonan (lihat perenggan 13).

(2) Asas yang dianggap sebagai cabaran pemohon terletak sepenuhnya dan keseluruhannya ke atas fakta bahawa responden tidak memasukkan butir-butir mengenai dataran kawasan pilihanraya yang diusulkan di dalam notis tersebut. Mahkamah Rayuan dalam kes *Pengerusi Suruhanjaya Pilihanraya Malaysia (Election Commission of Malaysia) v See Chee How & Anor* [2016] 3 MLJ 365 dengan sepenuhnya mengambil kira isu dataran dan telah membuat dapatan spesifik bahawa maklumat sedemikian tidak perlu. Maklumat sedemikian tidak menukar rasional bagi keputusan tersebut atau penggunaannya kepada fakta kes ini. Setelah menyemak penghakiman Mahkamah Rayuan dalam keseluruhannya dan berdasarkan asas di mana pemohon memohon

untuk mencabar notis tersebut, pemohon tidak mempunyai kes yang boleh dihujahkan bagi mahkamah untuk membenarkan kes didengar dalam pendengaran substantif (lihat perenggan 16–17 & 20–21).]

Notes

For cases on application for leave, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 5580–5583.

Cases referred to

Kemper Reinsurance Co v Minister of Finance and others [2000] 1 AC 1, PC (refd)

Mohamed Nordin bin Johan v Attorney-General, Malaysia [1983] 1 MLJ 68, FC (refd)

Pengerusi Suruhanjaya Pilihanraya Malaysia (Election Commission of Malaysia) v See Chee How & Anor [2016] 3 MLJ 365; [2015] 8 CLJ 367, CA (refd)

See Chee How & Anor v Pengerusi Suruhanjaya Pilihan Raya Malaysia (Election Commission of Malaysia) [2016] 8 MLJ 384, HC (refd)

Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2006] 5 MLJ 60; [2006] 1 CLJ 927, CA (refd)

WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] 4 CLJ 478, FC (folld)

Legislation referred to

Federal Constitution art 113(2), Thirteenth Schedule, ss 2, 2(c), 4, 4(a)
Rules of Court 2012 O 53 r 3(1)

Syahredzan Johan (Louis Liaw with him) (Ramrais & Partners) for the applicant.
Amarjeet Singh (Suzana bt Atan with him) (Senior Federal Counsels, Attorney General's Chambers) for the respondent.

Azizul Azmi Adnan JC:

[1] The applicant sought leave of court to make an application for judicial review.

BACKGROUND

[2] On 15 September 2016, the Election Commission published a notice entitled 'Notice of proposed recommendations for the Federal and State Constituencies in the States of Malaya as reviewed by the Election Commission in 2016'.

[3] Under art 113(2) of the Federal Constitution, the Commission has the power and obligation to undertake a review of the boundaries of the federal and

state constituencies at intervals of no less than eight years. Section 4 of the Thirteenth Schedule to the Federal Constitution requires the effect of any proposed recommendation arising from such review to be set out in a notice. The 15 September 2016 notice was one such notice.

[4] Section 2 of the Thirteenth Schedule spells out the principles to be taken into account by the Commission in re-delineating the constituency boundaries. Paragraph (c) provides for the general principle that the electors in each constituency should be approximately equal, although the Commission is entitled to apply 'a measure of weightage for area' to account for lack of accessibility and other factors affecting rural constituencies.

[5] Once a notice has been published, if a group of 100 or more persons whose names appear in the electoral roll in a constituency objects to the Commission's proposed recommendations affecting their constituency, the Commission must hold a local enquiry to hear such objections.

[6] The notice published by the Commission on 15 September 2016 did not provide details regarding the land mass of a proposed constituency. The applicant contended that the notice was deficient as a consequence of this omission, because it deprived the applicant of the opportunity to make competent and effective objections to the proposed recommendations by the Commission.

[7] On 10 October 2016, the applicant applied for (among others) certiorari to quash the notice and mandamus to compel the Election Commission to provide the land mass particulars to the applicant. On 22 November 2016, I heard the application for leave. This is a written decision in respect of that leave application.

THE APPLICATION FOR LEAVE: RATIONALE

[8] To obtain leave to apply for judicial review, an applicant must demonstrate that the application is not frivolous or vexatious and that there is at least an arguable case for granting the relief claimed.

[9] The reason why leave is required is to filter against frivolous or unmeritorious proceedings. The Judicial Committee of the Privy Council in *Kemper Reinsurance Co v Minister of Finance and others* [2000] 1 AC 1 explained the policy behind the requirement for leave in the following terms:

> [I]t is necessary for Their Lordships to consider what the policy of the leave requirement is.
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> In *O'Reilly v Mackman* [1983] 2 AC 237 at p 280 Lord Diplock explained that the

purpose of the leave requirement was to protect the public administration against false, frivolous or tardy challenges to official action. This policy has something in common with the policy of requiring leave to appeal, namely to act as a filter against frivolous or unmeritorious proceedings. It is also true that some types of judicial review, for example, on the ground of error of law by an inferior tribunal, are in practice indistinguishable from appeals (per Lord Hoffman).

THE TEST TO BE APPLIED

[10] At this leave stage, I am not entitled to examine the substantive merits of an application: see *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60; [2006] 1 CLJ 927, where it was also held that there was no difference between saying that a case was frivolous and that there was no arguable case:

> [T]he High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous. If, for example, the applicant is a busybody, or the application is made out of time or against a person or body that is immunised from being impleaded in legal proceedings then the High Court would be justified in refusing leave in limine. So too will the court be entitled to refuse leave if it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable, eg, proceedings in Parliament (see art 63 of the Federal Constitution).
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> ...
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> [T]o say that a case is frivolous is the same thing as saying that there is no arguable case. It is mere semantics.

[11] In the subsequent case of *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 CLJ 478, the Federal Court explained the procedure for leave in the following terms:

> [12] For purposes of its application, the appellant had alluded to the statutory route of O 53 of the Rules. Under this order two stages are anticipated, with the leave stage being the first, to be followed closely by the substantive hearing after successfully obtaining leave at the High Court. At the leave stage, on a quick perusal of the material available, if the court thinks that subsequently at the substantive hearing stage an arguable case may be disclosed, and the relief sought may be granted, leave should be granted (*IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617). In Malaysia, the Federal Court in *Mohd Nordin Johan v The Attorney-General, Malaysia* [1983] 1 CLJ 130; [1983] CLJ Rep 271 when allowing the appeal, opined that 'the point taken was not frivolous to merit refusal of leave in limine and justified argument on a substantive motion for certiorari'. Without the need to go into depth of the abundant authorities, suffice if we state that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though ie, unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged (per Suriyadi Halim Omar FCJ).

[12] The role of the judge at the leave stage is therefore to ascertain whether an application is frivolous, and if not thought frivolous, to consider if the applicant has at least an arguable case to obtain the relief sought for at the substantive hearing. The foregoing passage envisages the question of whether an application is frivolous as being distinct from the question of whether there is an arguable case. This of course differs from the majority view of the Court of Appeal in *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors*, which held that they are one and the same. I am guided and bound by the higher authority of the later Federal Court decision in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd*. In the following paragraphs, I apply the test laid down in this Federal Court decision.

THE APPLICATION OF THE TEST

[13] I accept that the application is not frivolous, taking into the account the fact that the matter for which review is sought affects the fundamental expression of a constitutionally-guaranteed right that is the hallmark of a free democratic society, namely the right to vote. The applicant is also a registered voter in the relevant state and federal constituencies and hence would appear to have sufficient locus standi to make the application.

[14] I now address the manner in which the court is to ascertain whether there is an arguable case. If the role of the leave stage is to sift out unmeritorious applications, it will be apparent that some review of the merits of an application will be necessary, for how else can an application be ascertained to be unmeritorious if the merits are not examined? It will only be possible to ascertain if the applicant has an arguable case if *some* examination of the merits is undertaken. Of course, this review should not be a detailed examination of entire substantive merits for the purposes of arriving at a definitive view — that is to be done later, after leave is granted. But this does not preclude the court from refusing leave if it finds that no arguable case has been made out.

[15] I find that the applicant does not have an arguable case. The reasons are as follows.

[16] An examination of the applicant's statement pursuant to O 53 r 3(1) of the Rules of Court 2012 will reveal that the basis of the applicant's putative challenge lies wholly and entirely on the fact that the Election Commission has not included the details of the land mass of the proposed constituencies in the notice.

[17] In *Pengerusi Suruhanjaya Pilihanraya Malaysia (Election Commission of Malaysia) v See Chee How & Anor* [2016] 3 MLJ 365; [2015] 8 CLJ 367, the Court of Appeal held that s 4(a) of the Thirteenth Schedule to the Federal

Constitution does not require the Election Commission to include in the notice the particulars of the land mass of the proposed constituencies (see para 43, read together with: (i) para 27 of the Court of Appeal judgment; and (ii) para 101 of the decision of the High Court at first instance in *See Chee How & Anor v Pengerusi Suruhanjaya Pilihan Raya Malaysia (Election Commission of Malaysia)* [2016] 8 MLJ 384). It was further held that the inclusion of the number of electors for each constituency as set out in the schedules to the notice in that case provided sufficient information for a voter to raise questions on the weightage that was given by the Commission.

[18] In the light of this decision — a decision to which this court is bound, by the operation of the principle of stare decisis — I fail to see how it can be established that the applicant has an arguable case.

[19] In the course of oral submissions, I invited counsel for the applicant to explain to the court how the facts of the present case might be different from those of *See Chee How* and how this case may in law be distinguished. Learned counsel responded in the following manner:

(a) the information relating to the land mass of each constituency was not the only information sought to be included in *See Chee How*. In that case, the applicants contended that the Commission was obliged to disclose additional matters such as the proposed electoral rolls, the proposed boundary map of the new polling districts and a complete list of polling districts affected by the proposed recommendation. By contrast in the present case, the application is limited to the issue of land mass;

(b) the issue of weightage in land mass in the context of s 2(c) of the Thirteenth Schedule of the Federal Constitution had not been ventilated before, or considered by, the Court of Appeal in *See Chee How* in its entirety; and

(c) whether or not *See Hee Chow* can be distinguished should be an issue to be canvassed at the substantive hearing, and not at the leave stage. Counsel also pointed out the fact that in its judgment, the Court of Appeal in *See Chee How* took no issue with the fact that leave had been granted for the judicial review application.

[20] In my considered view, the judgment of the Court of Appeal has fully taken into account the issue of land mass and had made a specific finding, at para 43 of the judgment, that such information was not necessary. That the information that had been sought to be included encompassed other items does not, in my mind, change the rationale for that decision nor its applicability to the facts of the present case. If the applicant wishes for the decision to be revisited, then the arguments for doing so should rightly be made

in an appeal against the decision of this court. I should also make the observation that, in the event that there is a successful appeal against my decision not to grant leave, it would be open to the Court of Appeal to proceed to hear the matter on its substantive merits: *Mohamed Nordin bin Johan v Attorney-General, Malaysia* [1983] 1 MLJ 68.

[21] I am also acutely aware of the role of the court at the leave stage of the proceedings and of the principle that a full consideration of the merits ought only be done at the substantive hearing. This does not however mean that I am to ignore a binding precedent in making the decision on whether or not the applicant has at least an arguable case. In my respectful view, the fact that the High Court in *See Chee How* had granted leave to proceed to the substantive hearing has no bearing on the present case, because there was then no binding authority operating on the High Court. The subsequent decision by the Court of Appeal in *See Chee How* now binds this court. Having reviewed the judgment of the Court of Appeal in its entirety, I have formed the view that, in the light of the basis upon which the applicant sought to challenge the Election Commission notice, the applicant does not have an arguable case for me to allow the case to be heard in a substantive hearing.

[22] The application is dismissed, with no order as to costs.

Application dismissed with no order to costs.

Reported by Dzulqarnain Ab Fatar